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No. 91-1506

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN TERRY,

Petitioner,

v.

M/S "BIRTE" RITSCHER KG,
G RITSCHER GmbH & CO.,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	2
I. The District Court Properly Interpreted The "Duty To Intervene" Established By This Court *In Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981)	3
II. The Decision Of The District Court, which was Affirmed By The Third Circuit Court of Appeals, Is In Accord With Decisions From The Fifth And Ninth Circuits Interpreting The Duty To Intervene	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: Page

Carpenter v. Universal Star Shipping, 924 F.2d 1539 (9th Cir. 1991) 6

Casaceli v. Mortech International, Inc., 774 F.2d 1322 (5th Cir. 1985), *cert. denied,* 475 U.S. 1108 (1986) 7

Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3d Cir. 1987), *cert. denied,* 486 U.S. 1007 (1988) 4

Futo v. Lykes Bros. S.S. Co., Inc., 742 F.2d 209 (5th Cir. 1984) 6

Helaire v. Mobil Oil Co., 709 F.2d 1031 (5th Cir. 1983) 5

Hunter v. Intreprinderea de Explore, 868 F.2d 1386 (5th Cir. 1991) 7

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) 3, 4, 5, 7

Taylor v. Moram Agencies, 739 F.2d 1384 (9th Cir. 1984) 5

Statutes:

Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) 3

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COUNTERSTATEMENT OF THE CASE

The Petition accurately states that petitioner, John Terry, was injured on November 23, 1987, while he was working as a longshoreman/groundman on a barge owned by his employer, Transport Marine Transport Corp., which was placed between the M/V INDEPENDENT CONCEPT, a vessel owned by respondent, and the Petty's Island Marine Terminal. The Petition also accurately restates most of the facts and assumptions regarding the stevedore's discharge operation that the District Court relied upon when it entered Summary Judgment in favor of respondent. The Petition, however, also contains several mischaracterizations of the evidence.

Contrary to the assertions contained in the Petition, there is absolutely no evidence that the vessel was "unstable" at the time of plaintiff's accident, or that there were any defects involving the ship or its equipment. The District Court, therefore, did not find, as alleged by petitioner, that "the *nature of the vessel,* coupled with the simultaneous operation of the cranes created an unreasonably dangerous 'work environment' for the longshoremen." *See* Petition at pp. 7-8 (emphasis added). In fact, the District Court specifically stated that the "dangerous condition that caused plaintiff's accident was *not* directly related to the ship or its equipment but instead [was] essentially an operational hazard . . ." (8a) (emphasis added). The District Court held that the lack of "trimline" stabilizing devices on the ship's cranes, "did not create a defective condition on the vessel." (9a). In addition, the District Court recognized that all ships roll to a degree during discharge operations. "The essence of plaintiff's claim," the Court said, "is that the simultaneous operation of the two cranes [by the stevedore] resulted in *excessive rolling* of the vessel . . ." (7a) (emphasis added). This, in combination with several other factors, created the dangerous condition. (7a-8a). It is incorrect for petitioner to imply, therefore, that the District Court found evidence of a defect or dangerous condition involving the ship or its equipment, or that the vessel was unstable.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner asserts that the decision handed down by the District Court and affirmed by the Third Circuit Court of Appeals places "an unduly limited construction on the duty to intervene established by this Court in *Scindia* in a manner which conflicts with decisions of the Fifth and Ninth Circuits." *See* Petition at p. 12. Furthermore, petitioner asserts that "the holding of the Courts below would be tantamount to eliminating *sub silento* [sic], the duty to intervene. . . ." *Id.* at 12-13. This

is simply an inaccurate analysis and interpretation of the District Court opinion. In fact, the District Court's decision, which was affirmed by the Court of Appeals, is a proper application of the duty to intervene set forth in *Scindia,* and is in complete accord with decisions from the Fifth and Ninth Circuits.

I. The District Court Properly Interpreted the "Duty to Intervene" Established by This Court in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981).

In *Scindia,* this Court defined the duties that a vessel owner owes to longshoremen under the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). This Court held that after stevedoring operations have begun on board a vessel, the vessel owner does not have a duty to supervise or inspect the work of the longshoremen. As this Court pointed out, once cargo operations have begun, the stevedore is "in the best position to avoid accidents" and the vessel owner has a "justifiable expectation . . . that the stevedore [will] perform with reasonable competence and see to the safety of the cargo operations." *Id.* at 171-172.

An exception to this rule was recognized under very limited circumstances. This exception, which has come to be known as the "duty to intervene," was described as follows:

> Yet it is quite possible, it seems to us, that [the stevedore's] judgment in this respect was so obviously improvident that Scindia [the vessel owner], if it knew of the defect and that Seattle [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of this condition.

Id. at 175-176.

In *Derr v. Kawasaki Kisen K.K.,* 835 F.2d 490 (3d Cir. 1987), *cert. denied,* 486 U.S. 1007 (1988), the Court of Appeals for the Third Circuit examined the "parameters" of the duty to intervene. *Id.* at 496. As the Court of Appeals in *Derr* pointed out, this Court "was prepared only to hold that if it were proven that the ship knew of the malfunctioning cargo winch that was part of the *ship's own gear,* and which it *might have duty to repair,* there was a basis for" imposing a duty to intervene. *Id.* at 496 (emphasis added). Therefore, the Court of Appeals concluded "[i]t is unlikely that the narrow duty of a ship to intervene to make repairs was intended to extend beyond defective conditions with respect to the ship, its equipment, and gear." *Id.*

Relying upon *Derr,* the District Court in this case likewise held that "there must be a defect in the ship, its equipment, or gear to impose a duty to intervene upon the vessel owner." (9a). Therefore, since the District Court determined that "the dangerous condition [was] not directly related to the ship or its equipment but instead [was] essentially an operational hazard . . ." the duty to intervene was found to be inapplicable. (8a). The District Court went on to explain the practical effect if a vessel owner is required to intervene when the dangerous condition involves an "operational hazard" created by the method of discharge utilized by the stevedore.

As the District Court pointed out, "the only way the vessel owner could eliminate the dangerous rolling condition" was by supervising the method of discharge utilized by the stevedore. (11a). In other words, the vessel owner would be required to supervise the operations of the stevedore to make sure it performs its job properly. In *Scindia,* however, this Court specifically held that a "shipowner has no duty to supervise or inspect" the work of an independent stevedore and "may not be held liable for injuries arising out of the stevedore's failure to perform his job properly." (11a-12a), *quoting Derr,* 835 F.2d at 490.

Contrary to petitioner's assertions, this holding does not eliminate *sub silentio* the duty to intervene. That duty still exists where the vessel owner knows of a defect involving the ship or its equipment, the vessel owner knows the stevedore will continue with the discharge operation despite the defect, and the vessel owner realizes that the condition presents an unreasonable risk of harm to the longshoremen. *Scindia,* 451 U.S. 175-176. As petitioner asserts, under these limited circumstances, "the duty to intervene creates an obligation on the part of the shipowner to take same form of positive action". *See* Petition at p. 12. Nothing in the District Court's opinion holds to the contrary.

In order to pursue this Petition, however, petitioner incorrectly asserts that this duty also requires a vessel owner to supervise cargo operations at times. *Id.* On the contrary, the duty to intervene only requires the vessel to step in and make repairs where the cause of the dangerous condition is a defect or malfunction in the ship or its equipment which the vessel had a duty to repair if the condition were present before the vessel was turned over to the stevedore; the duty does not require the shipowner to supervise the work of the longshoremen.

II. The Decision of the District Court, Which Was Affirmed By The Third Circuit, Is In Accord With Decisions from the Fifth and Ninth Circuits Court of Appeals Interpreting the Duty to Intervene.

Contrary to petitioner's assertions, the District Court's interpretation of the duty to intervene is not in conflict with decisions from the Fifth and Ninth Circuits. In *Helaire v. Mobil Oil Co.,* 709 F.2d 1031 (5th Cir. 1983), and *Taylor v. Moram Agencies,* 739 F.2d 1384 (9th Cir. 1984), which are cited by the petitioner to show a conflict, the Courts did not consider whether a vessel owner has a duty to intervene when the dangerous condition is caused by the stevedore's manner of operation. This issue, however, has been addressed by

the Courts of Appeals in the Fifth and Ninth Circuits in other cases, and they have interpreted the duty to intervene in exactly the same way as the District Court.

In *Carpenter v. Universal Star Shipping,* 924 F.2d 1539 (9th Cir. 1991), the Ninth Circuit Court of Appeals analyzed the *Scindia* decision to determine when a vessel owner has a duty to intervene. The Court held that "[i]t is not enough that the vessel knows or should know of a defect, and that the vessel knows the stevedore's actions have resulted in an unreasonable risk to longshoremen. It is further required that a part of the ship itself, the ship's 'gear,' cause the injury." *Id.* at 1543. As the *Carpenter* court pointed out, it makes sense to impose liability on a vessel owner where the defect arises from a problem or defect in the ship or its gear since the shipowner has a duty to maintain the ship and the gear. It is improper, however, to impose liability on the vessel owner where the stevedore actually causes the accident. *Id.* at 1545.

In *Futo v. Lykes Bros. S.S. Co., Inc.,* 742 F.2d 209 (5th Cir. 1984), the Fifth Circuit Court of Appeals also evaluated "the scope of the shipowner's duty to intervene . . . when the shipowner has knowledge of a dangerous condition." *Id.* at 211. The Court concluded that "[t]o impose a duty to intervene on the shipowner, respecting dangers not created by it which are obvious to the stevedore's employees and arise during and in the area of the stevedore's operations, *something more* is required than the mere shipboard location of the dangerous condition and the shipowner's knowledge of it." *Id.* at 215. The Court of Appeals in *Futo* was hesitant to define what else is required to impose a duty to intervene, but it pointed out that this requirement "may be satisfied if the accident is caused by a defective condition in the ship, its gear, or equipment." *Id.* at 215. The Court of Appeals also declined to "categorically rule either that this requirement may never be satisfied in

any other way or that involvement of a defective condition of the ship itself, its gear or equipment will inevitably suffice for this purpose in every situation." *Id.* at 215. The Court of Appeals preferred, instead, to adopt a "flexible approach." *Id.* The Court held, however, that there is no duty to intervene where "[n]othing that the shipowner did, and nothing about the ship itself, or any operation of it, contributed to the hazard." *Id.* at 221. Subsequent Fifth Circuit decisions have likewise held that "even when a shipowner knows of a danger on the ship, the shipowner nonetheless has no duty to intervene on the longshoreman's behalf so long as the danger is 'an open and obvious transitory condition created and controlled by the independent contractor, and wholly related to the contractor's gear and operations.' " *Hunter v. Intreprinderea de Explore,* 868 F.2d 1386, 1388 (5th Cir. 1991), *quoting Casaceli v. Mortech International, Inc.,* 774 F.2d 1322, 1327 (5th Cir. 1985), *cert. denied,* 475 U.S. 1108 (1986).

In light of the foregoing, it is clear that the summary judgment entered by the District Court and affirmed by the Third Circuit Court of Appeals is in complete accord with decisions from the Fifth and Ninth Circuits interpreting the duty to intervene. Therefore, there is no conflict between the Circuits as petitioner asserts. To the contrary, the Courts in those Circuits have likewise held that a vessel owner does not have a duty to intervene when the dangerous condition is created by the manner or method of discharge utilized by the stevedore. A contrary ruling would "repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship . . . [and] would saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Scindia,* 101 S. Ct. at 1623.

CONCLUSION

The decision of the District Court granting summary judgment in favor of respondent, which was affirmed by the Third Circuit Court of Appeals, is a proper interpretation of the duty to intervene set forth by this Court in *Scindia,* and is in accord with decisions handed down by the Courts of Appeals in the Fifth and Ninth Circuits. Therefore, a Writ of Certiorari should not be issued to review the Opinion and Judgment of the Courts below.

Respectfully submitted,

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